

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2007 MSPB 208

Docket No. DC-3443-06-0809-I-1

**Paul Durand,
Appellant,**

v.

**Environmental Protection Agency,
Agency.**

September 4, 2007

Paul Durand, Arlington, Virginia, pro se.

Paul Winick, Esquire, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

Chairman McPhie issues a separate opinion concurring in part and
dissenting in part.

OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision (ID) dismissing his appeal for lack of Board jurisdiction. For the reasons stated below, we GRANT the petition and VACATE the ID. We DISMISS the appellant's claim under the Veterans Employment Opportunities Act of 1998 (VEOA) for lack of jurisdiction and REMAND the appellant's request for relief under the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at 38 U.S.C. §§ 4301-4333) (USERRA) to the Washington Regional Office for further adjudication.

BACKGROUND

¶2 The appellant applied for the position of Environmental Engineer/Environmental Scientist, GS 9/11, with the agency. Initial Appeal File (IAF), Tab 6, Subtab 4H. On his application, he indicated that he is entitled to 5-point veterans' preference on the basis of service from 1975 to 2005. *Id.* The appellant submitted a letter from the Department of Veterans Affairs (DVA) certifying that he is entitled to compensation for a service-connected disability rated at 30 percent or more, and that he served on active duty in the armed forces before being separated under honorable conditions. *Id.*, Subtab 4G. He also submitted a Statement of Service from the U.S. Public Health Service (PHS) indicating that he had served on active duty as a PHS Commissioned Officer from 1975 until his retirement in 2005. *Id.*, Subtab 4I.

¶3 The agency did not give the appellant any veterans' preference in the selection process. The appellant was considered but was not selected for the position. The appellant filed a complaint with the Department of Labor (DOL), alleging that the agency violated his veterans' preference rights. *See id.*, Subtabs 4C & 4D. DOL determined, however, that the appellant's service as a PHS Commissioned Officer did not entitle him to veterans' preference. *Id.*

¶4 The appellant then filed a Board appeal challenging his nonselection. IAF, Tab 2. He argued that the agency should have treated him as a preference-eligible veteran on the basis of his PHS service and his status as a disabled veteran. *Id.* He also alleged that the agency had discriminated against him on the basis of his disability and age. *Id.*

¶5 After the agency moved to dismiss the appeal for lack of jurisdiction, IAF, Tab 6, the administrative judge (AJ) issued an order to show cause, IAF, Tab 7. In her order, the AJ informed the appellant of the requirements for establishing Board jurisdiction under both VEOA and USERRA. *Id.* The appellant filed a timely response to the AJ's order. IAF, Tab 8.

¶6 The AJ issued an ID dismissing the appeal for lack of jurisdiction. IAF, Tab 9. She found that the Board lacks jurisdiction over the appellant's VEOA claim because he is not a preference-eligible veteran under VEOA. *Id.* at 3. With respect to the appellant's claim under USERRA, the AJ found that the Board lacks jurisdiction because the appellant merely alleged that he did not receive more favorable treatment because of his uniformed service. *Id.* at 4.

¶7 The appellant has filed a petition for review (PFR) of the ID. PFR File, Tab 1. The agency has filed a timely response in opposition to the PFR. PFR File, Tab 3.

ANALYSIS

The Board has jurisdiction over the appellant's USERRA claim.

¶8 USERRA provides, in relevant part, that a person who has performed service in a uniformed service shall not be denied initial employment on the basis of that performance of service. 38 U.S.C. § 4311(a). Thus, to establish Board jurisdiction over a USERRA appeal, the appellant must at least allege that: (1) He performed duty in a uniformed service of the United States; (2) he was denied initial employment; and (3) the denial of initial employment was due to the performance of duty in the uniformed service. *Dale v. Department of Veterans Affairs*, 102 M.S.P.R. 646, ¶ 14 (2006), *review dismissed*, 199 F. App'x 948 (Fed. Cir. 2006). The appellant's service in the commissioned corps of the PHS qualifies as duty in a uniformed service, 38 U.S.C. § 4303(16), and he has clearly alleged that he was denied initial employment with the agency, IAF, Tab 2. The remaining question, therefore, is whether the appellant has alleged that he was denied initial employment because of his service in a uniformed service.

¶9 The appellant, who was pro se, asserted that the agency was only concerned with denying his veterans' preference and that the agency gave no consideration to his Department of Veterans Affairs rated disability. IAF, Tab 8. He claimed that the agency failed to comply with USERRA. IAF. Tabs 4, 8; PFRF, Tab 1.

Liberally construing the pro se appellant's claim, we find that he has established jurisdiction under USERRA. *See Gaston v. Peace Corps*, 100 M.S.P.R. 411, ¶ 8 (2005) (the appellant raised a nonfrivolous claim of jurisdiction under USERRA where he claimed that his veterans' preference should have placed him ahead of the other candidates and that a nonveteran was selected over him); *Martir v. Department of the Navy*, 81 M.S.P.R. 421, ¶ 9 (1999) (the appellant raised a nonfrivolous claim of jurisdiction under USERRA where he alleged that he was a veteran, the agency denied him permanent appointment to any of four vacant positions, and the agency offered permanent appointments to these positions to similarly situated nonveterans).

¶10 The appellant requested a hearing in this appeal. IAF, Tab 2. After the ID was issued, the Board's reviewing court held that an individual who brings a USERRA appeal has an unconditional right to a hearing. *Kirkendall v. Department of the Army*, 479 F.3d 830, 844-46 (Fed. Cir. 2007), *petition for cert. filed*, 76 U.S.L.W. 3009 (U.S. July 5, 2007) (No. 07-19). We must therefore remand the appellant's USERRA appeal for a hearing.

The Board does not have jurisdiction over the appellant's VEOA claim.

¶11 To establish Board jurisdiction over an appeal brought under VEOA, an appellant must (1) show that he exhausted his remedy with DOL and (2) make nonfrivolous allegations that (i) he is a preference eligible within the meaning of the VEOA, (ii) the actions at issue took place on or after the October 30, 1998 enactment date of VEOA, and (iii) the agency violated his rights under a statute or regulation relating to veterans' preference. 5 U.S.C. § 3330a; *Abrahamsen v. Department of Veterans Affairs*, 94 M.S.P.R. 377, ¶¶ 6, 8 (2003). The AJ found that the appellant failed to establish jurisdiction because he is not a preference eligible.

¶12 There are several different ways that an individual can qualify as a preference eligible. 5 U.S.C. § 2108(3). Generally, an appellant must show that he served on active duty in the armed forces in order to qualify as a preference

eligible. 5 U.S.C. § 2108(1) & (2). The PHS is not included in the definition of “armed forces,” 5 U.S.C. § 2101(2), and the appellant has not shown that he ever served in the armed forces.¹ A separate statutory provision, however, gives commissioned officers in the PHS the same “rights, privileges, immunities, and benefits” under federal law as commissioned officers of the Army, provided that such active service in the PHS was performed “(1) in time of war; (2) on detail for duty with the Army, Navy, Air Force, Marine Corps, or Coast Guard; or (3) while the [PHS] is part of the military forces of the United States pursuant to Executive order of the President.” 42 U.S.C. § 213(a). Therefore, if the appellant’s active service in the PHS meets one of the three criteria set forth in 42 U.S.C. § 213(a), he is entitled to veterans’ preference to the same extent as a commissioned officer of the Army with the same period of service. There is no indication in the record that the appellant ever served on detail for duty with one of the armed forces, or that the PHS was ever designated as part of the military forces of the United States by Executive order during his period of service. The only remaining question, therefore, is whether the appellant served “in time of war.”

¶13 We note that there is no statutory definition of the term “time of war,” and neither the Board nor any federal court has ever defined that term as it is used in 42 U.S.C. § 213(a). Courts have defined that term as used in other statutory provisions to encompass periods during which there is no formal declaration of war, including the Persian Gulf War that started in 1990.² *See, e.g., Koohi v.*

¹ We note that the letter from the Department of Veterans Affairs indicates that the appellant served on active duty in the armed forces. IAF, Tab 6, Subtab 4G. It is clear from the rest of the record, however, that the appellant’s only uniformed service was in the PHS. We therefore conclude that the letter from DVA simply misstates the nature of the appellant’s uniformed service.

² *See* 38 U.S.C. § 101(33) (for purposes of USERRA, “[t]he term ‘Persian Gulf War’ means the period beginning on August 2, 1990 and ending on the date thereafter prescribed by Presidential proclamation or law.”).

United States, 976 F.2d 1328, 1334 (9th Cir. 1992) (“[N]o one can doubt that a state of war existed when our armed forces marched first into Kuwait and then into Iraq.”).

¶14 However, the Office of Personnel Management (OPM), which administers entitlement to veterans’ preference in employment under title 5 of the United States Code, has taken the position in its *VetGuide* that the term “war,” as used in Title 5 of the United States Code, is limited to those armed conflicts “for which a declaration of war was issued by Congress.” U.S. Office of Personnel Management, *VetGuide*, Appendix A, <http://www.opm.gov/veterans/html/vetguide.asp>. The Board recently held that positions taken by OPM in the *VetGuide*, while not entitled to the deference accorded to regulations, may be entitled to some weight. *Brandt v. Department of the Air Force*, 103 M.S.P.R. 671, ¶ 14 (2006). The amount of weight given to such positions depends in part on factors such as the consistency of the agency’s position, its formality, and its persuasiveness. *Id.* (citing *United States v. Mead Corp.*, 533 U.S. 218, 227-28 (2001)).

¶15 We are not aware of any issuance in which OPM has taken a contrary position regarding the definition of “war” in Title 5 of the United States Code. In addition, we note that the Board held in *Brandt*, 103 M.S.P.R. 671, ¶ 15, that the *VetGuide* is a formal document published on OPM’s web site, “with the apparent expectation that it would be relied on by agencies, employees, prospective employees, and other interested members of the public.” *Id.* With respect to persuasiveness, we find that OPM’s interpretation of the term “war” to be entirely reasonable and consistent with the statutory language. In 1997, Congress added a special provision conferring preference eligible status on individuals who served on active duty in the armed forces between August 2, 1990, and January 2, 1992. National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, § 1102(a)(1)(C), 1997 U.S.C.C.A.N. (111 Stat.) 1629, 1922 (codified at 5 U.S.C. § 2108(1)(C)). If active duty service in the armed forces during the Persian Gulf

War, an armed conflict for which no declaration of war was issued, constituted service “during a war,” individuals who served on active duty during that conflict would already be considered veterans under 5 U.S.C. § 2108(1)(A), which defines one category of preference eligible veterans as individuals who served on active duty in the armed forces during a war. The 1997 amendment conferring preference eligible status on those who served on active duty during the Persian Gulf War would therefore be a nullity. OPM’s interpretation of the term “war,” as used in 5 U.S.C. § 2108(1)(A), would avoid that result, and therefore we find it persuasive. Accordingly, we find that “war,” as used in 5 U.S.C. § 2108(1)(A), means an armed conflict for which a declaration of war was issued by Congress.

¶16 The question remains whether “time of war,” as used in 42 U.S.C. § 213(a)(1), necessarily has the same meaning as “war,” as used in 5 U.S.C. § 2108(1)(A). As noted above, the term “time of war,” as used in other statutes, has been interpreted more broadly to include armed conflicts for which there was no formal declaration of war. However, because 42 U.S.C. § 213(a)(1) and 5 U.S.C. § 2108(1)(A) must be read together in order to determine whether a Commissioned Officer of the PHS, such as the appellant, is preference eligible, we find that it is appropriate to interpret both provisions as requiring a formal declaration of war by Congress.

¶17 As OPM notes in its *VetGuide*, the last “war” for which active duty is qualifying for veterans’ preference is World War II, and the inclusive dates for service in that war are December 7, 1941, through April 28, 1952. *See VetGuide*, Appendix A. Therefore, no period of the appellant’s service as a Commissioned Officer in the PHS constitutes service “in time of war.” Accordingly, we find that the appellant has failed to make a nonfrivolous allegation that he is preference eligible, and we dismiss his VEOA claim.

ORDER

¶18 We therefore DISMISS the appellant's request for relief under VEOA and REMAND this appeal to the regional office for a hearing on the appellant's USERRA claim. After holding the appellant's requested hearing, the AJ shall issue a new ID.

FOR THE BOARD:

Matthew D. Shannon
Acting Clerk of the Board
Washington, D.C.

OPINION OF NEIL A. G. MCPHIE,
CONCURRING-IN-PART AND DISSENTING-IN-PART,

in

Paul Durand v. Environmental Protection Agency

MSPB Docket No. DC-3443-06-0809-I-1

¶1 I agree with the majority that the appellant does not have preference eligible status, and that as a result, his claim under the Veterans Employment Opportunities Act (VEOA) must be dismissed. As explained below, however, I do not agree with the majority that the appellant has asserted a claim under the Uniformed Services Employment and Reemployment Rights Act (USERRA) which must be remanded for a hearing.

BACKGROUND

¶2 In 2005, the appellant retired from the Public Health Service (PHS), where he had served as a Commissioned Officer. Initial Appeal File (IAF), Tab 6, Subtab 4I. He then applied for the position of Environmental Engineer/Environmental Scientist, GS-9/11, with the agency herein. *Id.*, Subtab 4H. The agency did not select him, and alleges without rebuttal that the successful candidate, like the appellant, served in the PHS. *Id.*, Subtab 4F.³

¶3 The appellant filed a complaint with the Department of Labor (DoL) alleging a violation of his veterans' preference rights, but DoL found that the appellant does not have preference eligible status. *Id.*, Subtab 4C. The appellant

³ I acknowledge that the agency's allegation that the selectee also had prior PHS service appears in a pleading signed by the agency's representative, and that ordinarily the Board will not consider statements of a party's representative in a pleading to be evidence. *Hendricks v. Department of the Navy*, 69 M.S.P.R. 163, 168 (1995). Still, the appellant has never challenged the agency representative's statement or asked for the opportunity to disprove it, in all likelihood because, as detailed below, the appellant has never claimed that the reason the agency did not select him for employment was because he previously served in the PHS.

then filed a petition for appeal in which he claimed a violation of his veterans' preference rights, and filled out the portions of the appeal form dealing with VEOA claims. He also claimed discrimination on the bases of age and disability, as well as unspecified violations of the Civil Rights Act and the Fair Labor Standards Act (FLSA). The appellant did not respond to a question on the appeal form which, according to the instructions, should be answered by anyone who is "filing a USERRA appeal." The appellant requested a hearing. IAF, Tab 2 at 2-7 & Question 32.

¶4 The administrative judge asked the appellant to clarify whether he intended to assert a USERRA claim in addition to the other matters raised in his petition for appeal, and the appellant responded that he did, with no elaboration upon or explanation of the basis for his purported USERRA claim. IAF, Tabs 3, 4. In response to a subsequent order to show cause concerning jurisdiction under both VEOA and USERRA, IAF, Tab 7, the appellant claimed that the agency violated "USERRA" by not granting him veterans' preference and not carefully examining his employment history; he also claimed that the agency committed disability discrimination. IAF, Tab 8.

¶5 The administrative judge dismissed the appeal for lack of jurisdiction. She found, with regard to the appellant's VEOA claim, that the appellant does not have preference eligible status. She found, with regard to the appellant's purported USERRA claim, that the appellant did not actually allege that the agency's decision not to select him was because of his prior uniformed service; she also noted that the selectee for the position the appellant sought had also served in the PHS. IAF, Tab 9.

¶6 The appellant has filed a petition for review devoted to arguing that he is a preference eligible by virtue of his PHS service. In so arguing, the appellant states without elaboration that he "has rights under USERRA" and is "cover[ed]" by USERRA. Petition for Review File, Tab 1 at 3, 13.

¶7 The majority agrees with the administrative judge that the appellant is not entitled to veterans' preference, and that accordingly, his VEOA claim must be dismissed. The majority vacates the administrative judge's dismissal of the appellant's USERRA claim, finds that the appellant has established USERRA jurisdiction, and remands the USERRA claim for a hearing.

DISCUSSION

I. VEOA

¶8 I agree with the majority that 42 U.S.C. § 213(a)(1) and 5 U.S.C. § 2108, when read together and in light of Office of Personnel Management guidance, confer preference eligible status only on those commissioned officers of the PHS who served during a war declared by Congress. I further agree with the majority that the appellant's PHS service from 1975 to 2005 does not meet this requirement, and that as a result, the appellant does not have preference-eligible status. I therefore agree with the majority that the appellant's VEOA claim must be dismissed. *See Champion v. Merit Systems Protection Board*, 326 F.3d 1210 (Fed. Cir. 2003) (an individual must be a preference eligible to have standing to bring a VEOA claim alleging violation of veterans' preference rules).

II. USERRA

¶9 To establish Board jurisdiction under USERRA, the appellant must show that he performed qualifying uniformed service, and non-frivolously allege that he was subjected to one of the actions prohibited by 38 U.S.C. § 4311. *Randall v. Department of Justice*, 105 M.S.P.R. 524, ¶ 5. As relevant here, section 4311 prohibits denial of employment on account of an applicant's prior performance of uniformed service.⁴

⁴ Under USERRA, the Board also has the authority to adjudicate a claim for violation of reemployment rights brought by an individual who was absent from civilian employment to perform active military duty. 38 U.S.C. §§ 4313, 4324. Here, the appellant does not allege any facts that might give rise to a reemployment rights claim.

¶10 In this case, the appellant has not made a non-frivolous allegation that the agency did not select him on account of his prior uniformed service; indeed, he does not make such an allegation *at all*. Further, USERRA does not give the Board the authority to consider the appellant's claims of age discrimination, disability discrimination, discrimination in violation of the Civil Rights Act, violation of the FLSA, or failure to carefully examine his employment record. *See Bodus v. Air Force*, 82 M.S.P.R. 508, ¶¶ 14-17 (1999). The appellant is simply mistaken when he equates violation of veterans' preference rules with a violation of USERRA, and in any event, the appellant is not a preference eligible. Finally, the appellant's two fleeting references to USERRA in his petition for review, in which he argues at length that he should be accorded veterans' preference, do not amount to a non-frivolous allegation that the agency did not select him on account of his prior uniformed service. Simply put, the appellant's invocation of USERRA is purely pro forma, and is not sufficient to establish USERRA jurisdiction. *Cf. Clark v. Tarrant County*, 798 F.2d 736, 741-42 (5th Cir. 1986) (a case may be dismissed for lack of subject matter jurisdiction when the claimant makes a pro forma assertion of jurisdiction under a particular statute solely to avoid dismissal).

¶11 As noted above, the administrative judge expressly stated in her initial decision that the appellant did not even allege that he was not selected for the Environmental Engineer position because of his prior PHS service. The appellant has filed a lengthy and detailed petition for review, yet he does not argue that the administrative judge mischaracterized his pleadings or overlooked one of his allegations. The majority nevertheless remands this case for a hearing, at which the appellant will bear the burden of proving an allegation he does not make and which would be virtually impossible to prove in any event if, as the agency avers without rebuttal, the selectee for the Environmental Engineer position also had prior PHS service. *See Sheehan v. Department of the Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001) (the appellant bears the burden of proving that an employer acted

with an unlawful motivation under 38 U.S.C. § 4311). Remanding this case for a hearing under USERRA will do nothing but confuse the parties and the administrative judge, since none of the claims that the appellant has actually made may be considered under USERRA. The fact that the appellant performed uniformed service and was subjected to an action (non-selection for employment) that is covered by 38 U.S.C. § 4311, without more, does not establish USERRA jurisdiction. The appellant has had ample opportunity to assert a claim that is cognizable under USERRA and he has not done so.

CONCLUSION

¶12 The administrative judge was correct to conclude that the appellant is not a preference eligible with the right to bring a VEOA appeal. She was also correct to conclude that the appellant does not allege facts that, if proven, could establish a USERRA violation. I would deny the appellant's petition for review.

Neil A. G. McPhie
Chairman